

Cleveland State University
EngagedScholarship@CSU



Cleveland State Law Review

Law Journals

2014

Religion Without God and the Future of Free Exercise

R. George Wright

Indiana University Robert H. McKinney School of Law

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [First Amendment Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

R. George Wright, *Religion Without God and the Future of Free Exercise*, 63 Clev. St. L. Rev. 147 (2014)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol63/iss1/10>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

RELIGION WITHOUT GOD AND THE FUTURE OF FREE EXERCISE

R. GEORGE WRIGHT*

In *Religion Without God*,¹ Ronald Dworkin offers a distinctive moral reading of, primarily, the Free Exercise Clause,² rather than an historical or precedent-based reading of that clause. Professor Dworkin's reading apparently seeks to expand the class of persons whose beliefs might fall within the potential coverage of the Free Exercise Clause. But Dworkin's recommended class of covered persons is, we shall suggest, controversial in both its inclusions and exclusions.³ Dworkin's criteria for the revised class of those covered by the Free Exercise Clause would likely be unstable,⁴ with significant further consequences for the substance of free exercise jurisprudence in general.⁵ The limits of free exercise conscience coverage would, we suggest, likely be further re-set, not in accordance with Professor Dworkin's criteria, but instead in accord with what we might call a broader Hobbesian egalitarianism.⁶ And as the class of persons covered by the Free Exercise Clause thus expands under contemporary cultural circumstances, we should realistically expect a general depreciation⁷ of the Free Exercise Clause.

Professor Dworkin seeks, apparently, to expand and to limit the scope of Free Exercise Clause coverage to persons holding and motivated by particular beliefs he refers to as, in a broad sense, religious. The idea of religion, one might imagine, should encompass, at a bare minimum, recognizable theists, whether such theists would also think of moral values as objective or not.⁸ But Dworkin indicates that for his purposes, religion must hold "that inherent, objective value permeates

* Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law.

¹ RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013).

² U.S. CONST. amend. I. This is not to suggest that Dworkin is here unconcerned either with the Establishment Clause, or with broader principles of any constitution informed by liberal equality. For the inseparability of free exercise and Establishment Clause privileges and burdens, see, for example, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 11 (2000).

³ See *infra* notes 32-48 and accompanying text.

⁴ See *infra* notes 38-56 and accompanying text.

⁵ See *infra* notes 56-76 and accompanying text.

⁶ See *infra* notes 50-55 and accompanying text.

⁷ For a sense of this metaphorical usage, see *Depreciation Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/50423?redirectedFrom=depreciation#eid> (last visited Nov. 30, 2013).

⁸ See, e.g., THOMAS L. CARSON, *VALUE AND THE GOOD LIFE* 267 (2000) (summarizing a combination of a non-realist theory of value with a theistic "divine preference" theory of morality and rational action).

everything,⁹ that the universe and its creatures are awe-inspiring,¹⁰ that human life has purpose and the universe order.”¹¹ Such persons may, on Dworkin’s theory, harbor “profound”¹² “convictions”¹³ comparable to those of traditional theists. Dworkin’s non-theistic religious believers are said to “find the Grand Canyon not just arresting but breathtakingly and eerily wonderful. They are not simply interested in the latest discoveries about vast space but enthralled by them,”¹⁴ on objective grounds.¹⁵ More broadly, the Dworkinian-protected atheist religious believer recognizes something like “beauty and sublimity,”¹⁶ and the idea, or the experience, of the “supernatural.”¹⁷

⁹ Professor Dworkin famously argues that the objectivity, or lack of objectivity, of ethical principles does not belong to a realm of metaethics separate and distinct from substantive or normative ethics. See Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996); see also MATTHEW KRAMER, MORAL REALISM AS A MORAL DOCTRINE (2009); THOMAS NAGEL, THE LAST WORD (2001). For a sampling of responses to this claim, see Brian Leiter, *Objectivity, Morality, and Adjudication*, in OBJECTIVITY IN LAW AND MORALS 66, 66 (Brian Leiter ed., 2001); Nicos Stravropoulos, *Review of Objectivity in Law and Morals*, 65 MOD. L. REV. 634 (2002); John Tasioulas, *The Legal Relevance of Ethical Objectivity*, 47 AM. J. JURIS. 211, 225-27 (2002); see also the respective contributions of Russ Shafer-Landau, Daniel Star, & Michael Smith in Symposium, *The Possibility of Metaethics*, 90 B.U. L. REV. 479 (2010). Whether Dworkin is right about this is of genuine importance. But the question does not bear decisively on the subject of this essay, and will herein be set aside.

¹⁰ Already, the reader may rightly sense that Dworkin’s account of “religion” without God may sound more like a central case-focused account, as opposed to an attempt to draw precise lines of inclusion or exclusion regarding what should count as religion without God for free exercise purposes.

¹¹ DWORKIN, *supra* note 1, at 1.

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.* at 2-3. Again, unless Professor Dworkin intends these attitudes to be merely illustrative, it would not be difficult to characterize his approach to non-theistic religion as narrowly “intellectualist,” or even class-biased, unless we assume that enthrallment with dark energy, dark matter, the Higgs boson, string theory, amplituhedrons, and quantum gravity is a realistic possibility for all competent adults.

¹⁵ *Id.* at 3. For an interesting approach to an ultimate blurring of the objective and the subjective, see Steven D. Smith, *Is God Irrelevant?*, 94 B.U. L. REV. 1339 (2014).

¹⁶ *Id.* at 6. The idea of the ‘sublime’ is not without murkiness, and can even be rather off-putting. For a classic exposition, not necessarily endorsed by Dworkin, see EDMUND BURKE, A PHILOSOPHICAL INQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL (Harvard Classics ed., 1914) (1757), available at www.bartleby.com/24/2/107.html (“[W]hatever is fitted in any sort to excite the ideas of pain and danger, that is to say, whatever is in any sort terrible, or is conversant about terrible objects, or operates in a manner analogous to terror, is a source of the sublime”); see also IMMANUEL KANT, CRITIQUE OF THE POWER OF JUDGMENT 139 (Paul Guyer & Eric Matthews trans., 2001) (1793) (“[T]rue sublimity must be sought only in the mind of one who judges, not in the object in nature”); *id.* at 127 (“[W]e express ourselves incorrectly if we call some object of nature sublime”).

¹⁷ DWORKIN, *supra* note 1, at 6; see also *id.* at 12 (“the enchantment . . . of transcendental value”).

In fact, to qualify on Dworkin's terms as a free exercise-covered atheist, or otherwise non-theistic religious believer, a person must reject "all forms of naturalism,"¹⁸ in general,¹⁹ and naturalism as to values in particular.²⁰ Naturalism in Dworkin's sense is thus incompatible with a religious outlook or attitude, and is thus presumably incompatible as well with coverage under the Free Exercise Clause. Whether any such free exercise coverage exclusion would, in light of available alternative constitutional theories, make much practical difference, even for the excluded naturalists, is open to some question.²¹

Dworkin then further, and even more controversially, specifies that for atheists and other non-believers in one or more divinities to count as religious in Dworkin's sense—presumably, with Free Exercise Clause implications—such persons must reject not only naturalism, but must also reject a quite distinct and broadly popular view that Dworkin calls "grounded realism" about value.²² Grounded realism, which is incompatible with religion in Dworkin's sense, is the belief that our value judgments may be grounded on distinct and separate good reasons—perhaps through divine revelation,²³ the deliverances of natural law, abduction, induction, or reasoned probabilistic argument to a sensible conclusion—for our value judgments.²⁴

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 12.

²⁰ *Id.* at 13. The idea of 'naturalism,' or something vaguely like the methods or results of the sciences broadly understood, is subject to ambiguity and confusion. For a sorting of the strands in the area of legal philosophy, see Brian Leiter, *Naturalism in Legal Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/lawphil-naturalism/> (last revised July 31, 2012). For a broad, but critical view, see STEWART GOETZ & CHARLES TALIAFERRO, *NATURALISM* (2008). Compare also the approach taken in THOMAS NAGEL, *MIND AND COSMOS: WHY THE MATERIALIST NEO-DARWINIAN CONCEPTION OF NATURE IS ALMOST CERTAINLY FALSE* (2012).

²¹ For a provocative argument suggesting, as alternatives to free exercise claims, freedom of association, freedom of assembly, freedom of thought and speech, privacy, and perhaps even equal protection, see James W. Nickel, *Who Needs Freedom of Religion*, 76 U. COLO. L. REV. 941 (2005); see also *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 706 (2012) (freedom of association as an inadequate substitute for, or less than equivalent in its protection of, a church's free exercise right to select its own ministers).

²² DWORKIN, *supra* note 1, at 13.

²³ Dworkin rejects the idea of divine fundamental moral guidance on grounds that involve the so-called Euthyphro Dilemma. See DWORKIN, *supra* note 1, at 154. Professor Dworkin permits himself to consider only one formulation of, and one basic response to, the Euthyphro Dilemma, which is a continuing and contemporary source of fascinating, subtle, and variant argumentation. Virtually any Divine Command approach to ethics will at least implicitly address the Euthyphro Dilemma in one way or another, such that the variety of contemporary Divine Command Ethics responses cannot herein be displayed. For some recent approaches to the Euthyphro Dilemma, see, for example, ROBERT M. ADAMS, *FINITE AND INFINITE GOODS: A FRAMEWORK FOR ETHICS* (1999); ROBERT AUDI, *RATIONALITY AND RELIGIOUS COMMITMENT* pt. III, ch. 6 (2011); DAVID BAGGETT & JERRY L. WALLS, *GOOD GOD: THE THEISTIC FOUNDATIONS OF MORALITY* (2011); C. STEPHEN EVANS, *GOD AND MORAL OBLIGATION* (2013); *IS GOODNESS WITHOUT GOD GOOD ENOUGH?: A DEBATE ON FAITH, SECULARISM AND ETHICS* (Nathan L. King & Robert K. Garcia eds., 2009); JOHN E. HARE, *GOD'S CALL: MORAL REALISM, GOD'S COMMANDS AND MORAL REQUIREMENTS* (2001) RICHARD SWINBURNE, *THE COHERENCE OF THEISM* ch. 11 (rev. ed., 1993); KEITH WARD, *MORALITY, AUTONOMY, AND*

The supposedly constitutionally required alternative, ungrounded realism,²⁵ de-emphasizes the various sorts of evidence and factual judgments above. Dworkin's ungrounded realism relies more on our own subjectively persuasive value judgments, as tested by our responsible reflection on our various moral and other value convictions.²⁶ 'Responsible' reflection might bring certain of the above broad forms of reasoning into play.²⁷ But Dworkin argues that "the world of value is self-contained and self-certifying."²⁸ If this Dworkinian view itself admittedly involves a kind of faith,²⁹ Dworkin is, after all, introducing this category of supposedly ungrounded value realism precisely as a necessary condition of free exercise coverage of non-theistic³⁰ religious belief.³¹

It is useful at this point to notice how many sophisticated contemporary approaches to ethics, atheistic or otherwise, are ruled out of possible coverage under the Free Exercise Clause by Dworkin, on one ground or another. Merely to illustrate

GOD (2013); Richard Joyce, *Theistic Ethics and the Euthyphro Dilemma*, 30 J. Religious Ethics 49 (2002); T.J. Mawson, *The Euthyphro Dilemma*, 7 THINK 25 (2008) (citing, e.g., T.J. MAWSON, BELIEF IN GOD: AN INTRODUCTION TO THE PHILOSOPHY OF RELIGION ch. 4 (2005)); Simin Rahimi, *A Resolution to the Euthyphro Dilemma*, 50 HEYTHROP J., 753 (2009); Linda Zagzebski, *The Virtues of God and the Foundations of Ethics*, 15 FAITH & PHIL. 538 (1998); Nick Zangwill, *A Way Out of the Euthyphro Dilemma*, 48 RELIGIOUS STUDIES 7 (2012). Dworkin relies as well on a broad reading, even in the extremely distinctive context of a God who is defined as knowing, benevolent Love itself, of David Hume's principle of not inferring a moral 'ought' from a mere 'is.' See DAVID HUME, A TREATISE OF HUMAN NATURE bk. 111, pt. I, § 1 (L.A. Selby-Bigge ed., 1968) (1789); see DWORKIN, *supra* note 1, at 26, 31. On Dworkin's view, traditional theists thus supposedly turn out to be "ungrounded," as opposed to "grounded," value realists. See DWORKIN, *supra* note 1, at 22-31.

²⁴ DWORKIN, *supra* note 1, at 15-21.

²⁵ *Id.* at 15.

²⁶ *Id.* at 4, 15. For a brief similar account by Dworkin's colleague Thomas Nagel, see NAGEL, *supra* note 20, at 102-03.

²⁷ DWORKIN, *supra* note 1, at 23-24.

²⁸ *Id.* at 16.

²⁹ *Id.* at 17.

³⁰ Presumably Dworkin does not argue that, say, most traditional believers in divine command ethics, as supposedly grounded value realists, would thereby not meet the appropriate requirements of religious belief for free exercise purposes. Nor, presumably, would the illogic or incoherence of some or all divine command ethicists, in view of Dworkin's understanding of the Euthyphro Dilemma and Hume's Is-Ought divide, see DWORKIN, *supra* note 1, disqualify their beliefs from Free Exercise Clause coverage. Actually, Dworkin's rigid distinction between religious fact claims and religious value claims allows him to oddly conclude that theistic realism is in fact, happily, ungrounded rather than grounded, *id.* at 22-31.

³¹ Dworkin appears to conclude that those who, like, say, John Mackie, would deny that "ungrounded realism" can sufficiently justify the objectivity of moral beliefs do not and cannot refute the ungrounded value realism approach, but merely reject or fail to share this supposedly essential element of a broadly religious perspective. See J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977) (arguably developing a so-called "error theory" of metaethics).

the clarity with which thoughtful approaches may fall outside of Dworkin's free exercise entrance criteria, consider these excerpts from the short catechism of Duke philosopher Alex Rosenberg:

Is there a God? No . . . What is the meaning of life? "[There is none]" . . .
 What is the difference between right and wrong, good and bad? There is
 no moral difference between them. Why should I be moral? Because it
 makes you feel better than being immoral. Is anything you don't like
 forbidden, permissible, or sometimes obligatory? Anything goes.³²

This is an example of how a presumably conscientious, intellectually responsible, and in a sense a conscience-sensitive philosopher may fall outside the scope of free exercise coverage Dworkin seeks for some, but hardly all, atheists and agnostics. More broadly, Dworkin's requirements—including value objectivity, non-naturalism, and ungrounded realism—exclude from his expanded free exercise coverage a remarkably wide range of cogently argued-for perspectives,³³ developed and endorsed by responsible persons of sincere conscience³⁴ and principle.

³² ALEX ROSENBERG, *THE ATHEIST'S GUIDE TO REALITY: ENJOYING LIFE WITHOUT ILLUSIONS* 2-3 (2011).

³³ For a highly selective list of only those well-reputed more or less contemporary philosophers who would at least arguably be excluded from any possible accommodation under Dworkin's criteria, consider SIMON BLACKBURN, *ESSAYS IN QUASI-REALISM* (1993); SIMON BLACKBURN, *RULING PASSIONS: A THEORY OF PRACTICAL REASONING* (2000); DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* (reprt. ed. 2007); RICHARD GARNER, *BEYOND MORALITY* (1993); DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* (1990); ALLAN GIBBARD, *THINKING HOW TO LIVE* (2008); R.M. HARE, *FREEDOM AND REASON* (1977); GILBERT HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* (1977); RICHARD JOYCE, *THE MYTH OF MORALITY* (2007); RICHARD JOYCE, *THE EVOLUTION OF MORALITY* (2007); MARK ELI KALDERON, *MORAL FICTIONALISM* (2005); PHILIP KITCHER, *THE ETHICAL PROJECT* (2011); J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977); JESSE PRINZ, *THE EMOTIONAL CONSTRUCTION OF MORALS* (2007); RICHARD RORTY, *OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS* (1990); JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (Hazel E. Barnes trans., reprt. ed. 1993); WALTER SINNOTT-ARMSTRONG, *MORAL SKEPTICISMS* (2006); CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944); Sharon Street, *A Darwinian Dilemma for Realist Theories of Value*, 127 *PHIL. STUD.* 109 (2006); MARK TIMMONS, *MORALITY WITHOUT FOUNDATIONS: A DEFENSE OF ETHICAL CONTEXTUALISM* (1999); J.O. URMSON, *THE EMOTIVE THEORY OF ETHICS* (1969) (discussing A.J. Ayer; Charles L. Stevenson); DAVID B. WONG, *NATURAL MORALITIES: A DEFENSE OF PLURALISTIC RELATIVISM* (2006). See also several contributions to the recent *Special Issue: Irrationalism in Ethics*, 26 *RATIO* 351-470 (2013) (Bart Streumer, ed.) For any misclassifications above -- relativism in particular comes in objectivist and non-objectivist varieties -- the reader should feel entirely free to enter substitutions into the above roster.

³⁴ For a highly selective historical tour of the idea of conscience, in various distinct senses, but all arguably relevant to contemporary constitutional concerns, see, for example, PLATO, *APOLOGY* (Benjamin Jowett trans., 1871) (~399 BCE) available at <http://classics.mit.edu/Plato/apology.html> (last visited Nov. 24, 2013) ("You have often heard me speak of an oracle or sign which comes to me, and is the divinity which Meletus ridicules in the indictment. This sign I have had ever since I was a child. The sign is a voice which comes to me and always forbids me to do something which I am going to do, but never commands me to do anything . . ."); AUGUSTINE, *CONFESSIONS* 180 (Henry Chadwick trans., 1991) (reissued 2008) (~398) ("Every day my conscience makes confession relying on the

hope of your mercy as more to be trusted than its own innocence.”); JOHN CLIMACUS, *THE LADDER OF DIVINE ASCENT* 230 (Colm Luibheid & Norman Russell, trans., 1982) (~620?) (“Let our God-directed conscience be our aim and rule in everything so that, knowing how the wind is blowing, we may set our sails accordingly.”); BERNARD OF CLAIRVAUX, *On Conversion*, in *SELECTED WORKS* 63, 95 (G.R. Evans trans., 1987) (~1140) (“the gnawing of the conscience”); BONAVENTURE, *THE SOUL’S JOURNEY INTO GOD* para. 6, at 62 (Ewert Cousins trans., 1978) (~1259) (“[T]he spark of conscience” as “the summit of the mind,” along with other powers of the soul, “implanted in us by nature, deformed by sin and reformed by grace.”) ([C]onscience, like the other powers, “must be cleansed by justice, exercised by knowledge and perfected by wisdom.”); THOMAS AQUINAS, *SUMMA THEOLOGICA* first part, qu. 79, arts. 12-13 (Fathers of the English Dominican Province trans., rev. 2d ed., 1920); (Kevin Knight online ed., 2008) (~1270), *available at* www.newadvent.org/summa (last visited Nov. 20, 2013) (“Synderesis” as inclining us to the good, but “conscience” can be “laid aside.”); DUNS SCOTUS, *ON THE WILL AND MORALITY* 165 (Alan B. Wolter & William A. Frank trans., 1997) (~1300) (“[C]onscience is the habit of making proper practical conclusions, according to which a right choice of what is to be done is apt by nature to follow”); CATHERINE OF SIENA, *THE DIALOGUE* 90 (Suzanne Nofke trans., 1980) (~1378) (“Conscience always pulls in one direction, and sensuality in the other.”); *id.* at 120 (“the judgment seat of her conscience”) (referring also frequently to the “gnawing worm” or to the “dog” of conscience); THOMAS A KEMPIS, *THE IMITATION OF CHRIST* book 1, at 17 (Aloysius Croft & Harold Bolton trans., 2003) (~1425) (“No man rejoices safely unless he has within him the testimony of a clean conscience.”); GEORGE BERNARD SHAW, *SAINT JOAN: A CHRONICLE PLAY IN SIX SCENES AND AN EPILOGUE* scene V, at 103 (Penguin ed., 1946) (1924) (focusing on approximately the year 1430) (“JOAN [crossly] Well, I have to find reasons for you, because you do not believe in my voices. But the voices come first; and I find the reasons after”); *id.* at 110 (“JOAN . . . And how can you say that I am disobedient when I always obey my voices, because they come from God?”); IGNATIUS OF LOYOLA, *SPIRITUAL EXERCISES AND SELECTED WORKS* 141 (George E. Ganss trans., 1991) (1524) (referring to “the worm of conscience”); SAINT THOMAS MORE, *SELECTED WRITINGS* 137 (John F. Thornton & Susan B. Varenne eds., 2003) (letter to Margaret Roper of Apr. 17, 1534) (“I had not informed my conscience neither suddenly nor slightly but by long leisure and diligent search”); *id.* at 139 (“I . . . leave every man to his own conscience [on the oath]. And methinketh in good faith that so it were good reason that every man should leave me to mine.”); THERESA OF AVILA, *THE WAY OF PERFECTION* 76 (E. Allison Pears trans., 2011) (1577) (“Endeavor always to have a good conscience; practice humility; despise all worldly things.”); MONTAIGNE, *THE COMPLETE ESSAYS* 506 (Donald M. Frame trans., 1958) (~1580) (“It is ordinary to see good intentions, if they are carried out without moderation, push men to very vicious acts.”); WILLIAM SHAKESPEARE, *KING RICHARD III* act V, scene 3 (1597) (“RICHARD: My conscience hath a thousand several tongues./And every tongue brings in a several tale./And every tale condemns me for a villain”); JOHN LOCKE, *A LETTER CONCERNING TOLERATION: IN FOCUS* 32 (John Horton & Susan Mendus, eds., 1991) (1689) (“No way whatsoever that I shall walk in against the dictates of my conscience will ever bring me to the mansions of the blessed.”); ANTHONY ASHLEY COOPER EARL OF SHAFTSBURY, *CHARACTERISTICS OF MEN, MANNERS, OPINIONS, TIMES* 305 (John M. Robertson ed., 1964) (1711) (“[R]eligious conscience [in the sense of fearing the irresistible exercise of either just or unjust divine punishments] supposes moral and natural conscience.”); JOSEPH BUTLER, *Sermon II*, in *FIVE SERMONS*, 34, 37 (Stephen L. Darwall ed., 1983) (1726) (“[C]onscience in every man . . . pronounces determinately some actions to be in themselves just, right, good; others to be in themselves evil, wrong, unjust”); FRANCIS HUTCHESON, *AN ESSAY ON THE NATURE AND CONDUCT OF THE PASSIONS AND AFFECTIONS, WITH ILLUSTRATIONS ON THE MORAL SENSE* 7-8 (Aaron Garrett & Knud Haakonssen eds., 2002) (1728) (citing and relying on an active individual ‘moral sense’); GEORGE BERKELEY, *ALCIPHRON, OR THE MINUTE PHILOSOPHER: IN FOCUS* 43 (David Berman ed., 1993) (1752) (character of “Euphranor”) (“conscience always supposeth the being of a God”); ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 339 (Ryan Patrick Hanley ed., 2010) (1759)

(“The word conscience does not immediately denote any moral faculty by which we approve or disapprove. Conscience supposes, indeed, the existence of some such faculty, and properly signifies our consciousness of having acted agreeably or contrary to its directions.”); *id.* at 129-30 (conscience as a “supposed impartial and well-informed spectator . . . the great judge and arbiter”); HUME, *supra* note 23, at 458 (“Moral distinctions . . . are not the offspring of reason. Reason is wholly inactive, and can never be the source of so active a principle as conscience.”); IMMANUEL KANT, THE METAPHYSICS OF MORALS 189-90 (Mary Gregor trans., 1996) (1797) (“Consciousness of an internal court in man (‘before which his thoughts accuse or excuse another’) is conscience.”) (“conscience is the inner judge of all free actions”) (elaborated in Allen Wood, Kant on Conscience, *available at* www.stanford.edu/~allenw/webpapers/KantOnConscience.pdf) (distinguishing “moral knowledge,” “motivator,” and “reflection” theories of conscience); ARTHUR SCHOPENHAUER, THE ESSENTIAL SCHOPENHAUER: KEY SELECTIONS FROM THE WORLD AS WILL AND REPRESENTATION AND OTHER WRITINGS 197, 205 (Wolfgang Schirmacher ed., 2010) (~1819) (conscience as “the felt knowledge” of “the ethical significance of conduct”); G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT part II, sec. 3, § 137, at 164 (Allen Wood ed., H.B. Nisbet trans., 1991) (1821) (“True conscience is the disposition to will what is good in and for itself; it therefore has fixed principles, and these have for it the character of determinacy and duties which are objective for themselves.”); HENRY DAVID THOREAU, ON THE DUTY OF CIVIL DISOBEDIENCE 3 (1849), *available at* www.gutenberg.org/files/71/71-h/71-h.html (updated May 3, 2011) (“Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience then?”); JOHN HENRY NEWMAN, *A Letter to the Duke of Norfolk*, in CONSCIENCE, CONSENSUS, AND THE DEVELOPMENT OF DOCTRINE 434, 453 (James Gaffney ed., 1992) (1875) (conscience not as “a fancy or an opinion, but as a [well-informed] dutiful obedience to what claims to be a divine voice, speaking within us”); *id.* at 452 (noting the various limits and vulnerabilities of subjective (religious) conscience); HENRIK IBSEN, *An Enemy of the People*, in THE COMPLETE MAJOR PROSE PLAYS 277, 356 (Rolf Fjelde trans., 1965) (Penguin ed., 1978) (1882) (character of Dr. Thomas Stockmann: “The majority is never right. I say never! That’s one of those social lies that any free man who thinks for himself has to rebel against”); FRIEDRICH NIETZSCHE, *Dawn: Thoughts About Morality as a Prejudice*, in ON THE GENEALOGY OF MORALS AND ECCE HOMO 290, 290-291 (Walter Kaufmann trans., 1967) (1888) (the “revaluation of all values” as “a liberation from all moral values, in saying Yes to and having confidence in all that has hitherto been forbidden, despised, and damned. This Yes-saying . . . pours out its light, its love, its tenderness upon so many wicked things; it gives back to them their ‘soul,’ a good conscience, the lofty right and privilege of existence. Morality is not attacked; it is merely no longer in the picture”); WILLIAM JAMES, *The Varieties of Religious Experience*, in WRITINGS 1902-1910 1, 463 (Library of America ed., 1988) (referring to “my objective and my subjective conscience”); HENRY SIDGWICK, THE METHODS OF ETHICS XIII (John Rawls ed., 7th ed. 1981) (1907) (“I hold with Butler that ‘Reasonable Self-Love and Conscience are the two chief . . . principles in the nature of man,’ each of which we are under a ‘manifest obligation’ to obey.”); Gilbert Ryle, *Conscience and Moral Convictions*, 7 ANALYSIS 31, 34 (1940) (“In this sense conscience is never a merely verdict-passing faculty. Its exercise is behaving or trying to behave and not describing or recommending.”); C.D. Broad, *Conscience and Conscientious Action*, 15 PHIL. 115, 118 (1940) (conscience in a broad sense as involving moral reflection, appropriate moral emotions, and the disposition to seek what is believed to be morally good and avoid what is believed to be morally bad); JACQUES MARITAIN, MAN AND THE STATE 90 (Catholic Univ. of America Press ed., 1998) (1951) (human knowledge of the unwritten natural law as imperfect but very gradually increasing as the human conscience develops); Larry May, *On Conscience*, 20 AM. PHIL. Q. 57, 64 (1983) (“conscience acts as an enlightened but nonetheless egoistic counterweight to the more simple egoistic motivations to act selfishly”); JOSEPH RATZINGER, ON CONSCIENCE: TWO ESSAYS 62 (2007) (“Conscience requires [proper] formation and education [not mere socialization or popular opinion]. It can become stunted, it can be stamped out, it can be falsified.”); MOTHER TERESA, NO GREATER

Professor Dworkin is certainly entitled to recommend restricting additional entry into free exercise coverage only to those atheists or agnostics, etc., who meet his rather distinctive criteria.³⁵ But we should not expect all of those excluded thereby to readily accept constitutional second class status, particularly as other atheists and agnostics are, on Dworkin's proposal, being admitted to free exercise coverage. Without addressing the merits of the various underlying metaethical positions involved, it seems clear that some excluded metaethical noncognitivists, error theorists, quasi-realists, expressivists, emotivists, fictionalists, relativists, and pragmatists, at a minimum might want to argue that their own particular view is actually all that is coherently or otherwise rationally available, or that is "worth wanting."³⁶ For such persons, Dworkin's exclusionary criteria from free exercise coverage may seem arbitrary and readily contestable.

At this point, it is worth remembering that all those persons, including, very briefly, quasi-realists, emotivists, and pragmatists, excluded from Dworkin's free exercise coverage³⁷ would still retain some religion clause rights, specifically, as complainants in typical Establishment Clause cases. Presumably, an atheist of any sort, even an atheist not taken by intimations of the ineffable in a Higgs field or a sunrise, if sufficiently burdened, could bring an Establishment Clause challenge against a religious display.³⁸

LOVE 47 (2002) ("There is a natural conscience in every human being to know right from wrong . . . drawing them to God."); JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS* 3 (2006) (the Freudian super-ego or conscience as "a sometimes too rigid commitment" to the rules of society) (for a brief further discussion of the Freudian conscience, see PAUL STROHM, *CONSCIENCE: A VERY SHORT INTRODUCTION* 59-75 (2011)); William Lyons, *Conscience: An Exercise in Moral Psychology*, 84 *PHIL.* 477, 478 (2009) (distinguishing "classical Christian," "Freudian," and a "personal integrity" approach to conscience); *id.* at 488 (the "personal integrity" view of conscience as the gradual, multi-source result, over time, of a "deep commitment" to "objective" and "other-regarding" moral principles); STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE* 670 (reprt. ed., 2012) ("reason, principle, conscience, the . . . man within, the great judge and arbiter of our conduct" as capable of counteracting "strong impulses of self-love"); JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 294 (2013) ("[W]hen the problem is Me versus Us (or Me versus You) we should trust our gut moral reactions, otherwise known as conscience.").

³⁵ See *supra* note 33 (selectively represents various schools of contemporary thought).

³⁶ For a structurally parallel argument by Dworkin himself in the distinct context of immortality, see DWORKIN, *supra* note 1, at 158-59. The "worth wanting" formulation is developed in DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* (1984).

³⁷ At the risk of over-intellectualizing Professor Dworkin's practical recommendation, we might imagine a free exercise plaintiff being cross examined on the standing issue: a plaintiff influenced by Dworkin himself would, all else equal, qualify, whereas a plaintiff who is motivated by views closer to Blackburn's projectivist quasi-realism, Stevenson's classic emotivism, or Rorty's pragmatism, at whatever level of sophistication, would be vulnerable on the issue of standing. The thought of our most widely respected metaethicists serving as expert witnesses on such matters has a certain appeal.

³⁸ For an intriguing discussion of standing requirements in Establishment Clause context, as opposed to Free Exercise Clause context, see, for example, both opinions in *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005).

On Free Exercise Clause claims, though, Dworkin must argue that atheists who, among other criteria, accept value objectivity, non-naturalism, and ungrounded value realism are relevantly closer to, say, the classically theistic martyr than to any of the wide range of exponents of metaethical principles that Dworkin's constitutional criteria exclude.³⁹ This is a complex and plainly contentious matter. Dworkin, no less than anyone else, would need a genuinely satisfactory theory as to why his own preferred criteria, and not some other set of criteria, should be decisive. The bare idea of equality of respect for persons,⁴⁰ by itself, can hardly be of much help in deciding whether one class of persons is more relevantly similar to a constitutionally included group than to an excluded group.

We can hardly do more here than to hint at a few of the difficulties Dworkin's free exercise exclusions engender. Imagine merely three characters: Joan, a traditional theist driven by religious conscience,⁴¹ Ronald, motivated by a distinct set of beliefs,⁴² and Simon,⁴³ a sophisticated metaethicist excluded, on Dworkin's criteria, from free exercise standing in typical cases. Imagine as well any set of contexts in which Joan, or Ronald, or Simon might wish to bring a free exercise claim. And let us again set aside any difficulties of classification and application of Dworkin's criteria.

Suppose also that we also determine that Joan, Ronald, and Simon all have a conscience,⁴⁴ in some arguably relevant sense,⁴⁵ implicated by the particular free exercise context at hand. What role should such a conscience play in recognizing free exercise standing? The role of conscience by itself certainly need not be decisive. Other qualities, attitudes, emotions, or beliefs held by Joan, Ronald, or Simon might be relevant as well. Here are merely some other relevant possibilities: intensity of feeling; intensity of conviction; intensity of belief; profundity of belief; profundity of commitment; core beliefs; importance of belief; a moral compass-reading; ultimacy of belief; respectworthiness; integrity of the person; "mattering," or passion in caring; depth or persistence or priority of conviction; breadth of the relevant conviction; personal authenticity.⁴⁶

³⁹ DWORKIN, *supra* note 1, 6-13.

⁴⁰ DWORKIN, *supra* note 1, at 116.

⁴¹ SHAW, *supra* note 34 (for Joan); *see also* MARK TWAIN, JOAN OF ARC (2007) (1896).

⁴² *See supra* notes 9-31 and accompanying text.

⁴³ SIMON BLACKBURN, ESSAYS IN QUASI-REALISM (1993); SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING (2000); *see also* SIMON BLACKBURN, BEING GOOD: A SHORT INTRODUCTION TO ETHICS (2003).

⁴⁴ *See supra* note 34. At the time of the American constitutional framing, there was evidently some serious sentiment for protection of conscience, in addition to, if not instead of, the exercise of religion. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1480-85 (1990) (cited in *Gilardi v. HHS*, 733 F.3d 1208, 1212 (D.C. Cir. 2013)). For an endorsement of freedom of conscience itself as a human right, *see* Michael J. Perry, *Freedom of Conscience as Religious and Moral Freedom*, L.J. & RELIGION (forthcoming 2014), available at <http://ssrn.com/abstract=2287436> (last visited Nov. 1, 2013).

⁴⁵ *See supra* note 34.

⁴⁶ For references, collectively, to one or more of these qualities, *see*, for example, Raimond Gaita & John Haldane, *Is God Necessary for Morality*, in TRUTH AND FAITH IN

Are none of these considerations of any relevance to free exercise standing? Will Joan, Ronald, and Simon all inevitably score equally on all of the considerations we might consider relevant? If not, what inferences should we draw?⁴⁷ Perhaps Joan, Ronald, and Simon might, in some cases involving conscience, score roughly equally on sheer intensity of passion, or at least all above some relevant threshold of intensity. But would persons without any metaphysical commitments also score equally, or above the relevant threshold, on a quality such as the “depth” or “profundity” of their relevant beliefs? Is the idea of “depth” of “commitment,” apart from intensity, generality, articulateness, or duration,⁴⁸ inherently ‘tilted,’ toward the metaphysical believer? Are all equally intensely held moral beliefs entitled to be treated as equally profoundly held?⁴⁹ Are those who reject metaphysics entitled to be taken as metaphysically seriously as those who do not? Are those who reject the idea of metaphysical respect clearly and uncontroversially entitled to be treated with equal metaphysical respect?

These questions are likely impossible to resolve among the included and excluded parties, partly because possible answers might well advantage or disadvantage particular approaches to religious and metaethical questions. Realistically, are political activists who believe at most only in very minimal, attenuated metaethics likely to be content with a second class status under Dworkin’s Free Exercise Clause?⁵⁰ But are they, on the other hand, also likely to develop arguments against such status that Dworkin had not anticipated?

ETHICS 257, (Hayden Ramsey ed., 2011); JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 88-97 (2011); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 169 (2008); Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1494-96; Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91, 94 (2013); Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 915-17 (2010); Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 170-71 (2009); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1418-19 (2012); Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 357-58 (2005) (re authenticity in particular) (“it seems that freedom of conscience depends on a moral position that assigns preeminent value to something like ‘authenticity,’ even over conduct that conforms to objective moral truth”).

⁴⁷ One would hope to avoid the nightmare of free exercise standing as a continuum, or even as involving an open-ended, multi-factor balancing test.

⁴⁸ For a mere first step in one phase of considering such matters, see Jeremy Bentham’s dimensions of utility, as articulated in JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. IV (1789), available at www.econlib.org/library/Bentham/bnthPML4.html (last visited Nov. 4, 2013) (distinguishing the intensity, duration, certainty, propinquity, fecundity, and purity of pleasures and pains).

⁴⁹ By very loose analogy, how many emotionally mature adults can match the repeated sheer emotional intensity of a four-year-old child who will brook no contradiction in asserting that he or she is being treated grossly unfairly?

⁵⁰ It is probably fair to imagine that some of the less metaphysically ambitious activists would view dilution of the strength of a further equalized Free Exercise Clause as a feature, rather than as a bug. For one highly speculative possible dimension of future Free Exercise Clause jurisprudence, see R. George Wright, *A Cost-Benefit Analysis of Religious Persecution: Casting Up a Dread Balance Sheet*, 47 U. RICH. L. REV. 695 (2013).

There may be some single best resolution on the merits of the conflict between Dworkin's limited broadening of free exercise coverage and many persons of conscience still apparently excluded under Dworkin's approach. We shall not, however, pursue here such a 'right answer' on the merits. Instead, we offer here only a more pragmatic and predictive observation. Regardless of the merits, it is difficult to see Dworkin's free exercise exclusions, if adopted, as anything like a more or less stable equilibrium solution. The various pragmatists, expressivists, emotivists, quasi-realists, and so forth dissatisfied by Dworkin's exclusions might benefit from the sense that in such conflicts, the initial presumption should be in favor of basic equality among persons, and among forms of conscience, regardless of the disputed cogency of either side's arguments on the merits.

We can call this presumption in favor of yet further inclusion, beyond what Dworkin himself endorses, an extended form of a broad "Hobbesian default" in favor of equality in the classification of persons and rights-claimants. This reference is to Hobbes' famous characterization of the state of nature. Beginning at least with the Hobbesian story, "[e]quality rather than inequality has become the fundamental concept of political theory."⁵¹ For Hobbes, the supposed equality of persons in the state of nature need not be real. Instead, equality simply must be conceded if peace and civility are to be achieved.⁵²

This obviously loose analogy draws upon the pragmatic realism of Hobbes' Ninth Law of Nature.⁵³ Hobbes argues that

[i]f Nature therefore have made men equall, that equality is to be acknowledged: or if Nature hath made men unequall; yet because men that think themselves equall, will not enter into conditions of Peace, but upon Equall termes, such equalities must be admitted. And therefore for the ninth law of Nature, I put this, That every man acknowledge every other for his Equal by Nature.⁵⁴

To press the analogy yet further, note that Hobbes specifies that under the social contract, "no man require to reserve to himself any Right, which he is not content should be reserved to every one of the rest."⁵⁵

⁵¹ Martin A. Bertman, *Equality in Hobbes, with Reference to Aristotle*, 38 REV. POL. 534, 541 (1976). On this much, and at this level of generality, it is hard to imagine either Dworkin, or his most prominent excludes, disagreeing.

⁵² *Id.*

⁵³ See THOMAS HOBBS, *LEVIATHAN* pt. 1, ch. 15, at 211 (C.B. Macpherson ed., 1968) (1651). For brief commentary, see JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* 24-26 (reprt. ed. 1990) (1986); A.P. MARTINICH, *HOBBS: A BIOGRAPHY* 67-68 (1999); Alan Ryan, *Hobbes's Political Philosophy*, in *THE CAMBRIDGE COMPANION TO HOBBS* ch. 9, 208, 217 (Tom Sorell ed., 1996).

⁵⁴ Hobbes, *supra* note 53, at 211 (first emphasis added).

⁵⁵ *Id.* (emphasis deleted). For Hobbes' more fundamental discussion of pragmatic equality in the state of nature, *id.* ch. 13, at 183-84, a classic passage in Western political philosophy. For brief commentary, see, for example, MICHAEL OAKESHOTT, *HOBBS ON CIVIL ASSOCIATION* 35 (1975 ed.) (1937). Of course, Hobbes himself endorsed only utterly minimal legal accommodation, religiously-based or otherwise, of conscientious objection to typical sovereign commands. See Hobbes, *supra* note 53, ch. 26 at 203, 29 at 247. For perspective, see Patricia Springborg, *Hobbes on Religion*, in *THE CAMBRIDGE COMPANION TO HOBBS* ch.

Obviously, we do not presume that devotees of Dworkin and the non-qualifiers under Dworkin's murky and contestable classifications⁵⁶ occupy a state of nature. The point is merely that disputes over Dworkin's distinctions, as well as ultimate classifications thereunder, are likely to be resolved only on an essentially pragmatic or political basis, with the equality of purported consciences being the only realistic such basis.⁵⁷

If we suppose, then, that on what we might call Hobbesian pragmatic grounds, Dworkin's controversial exclusions from free exercise coverage cannot hold—in whole or in part—what sorts of further developments might we reasonably, if speculatively, anticipate?

Dworkin recognizes that once the right to free exercise is extended beyond its traditional theistic coverage, serious problems of the degree or depth of constitutional protection arise.⁵⁸ As the breadth of coverage is expended and diversified, the depth or strength of the right—the preemptive or “trumping”⁵⁹ quality of the right—must be sacrificed.⁶⁰ A right that will often call for some form of personal or group exemption from a standard government practice,⁶¹ or from a

14, at 346 (Tom Sorrell ed., 1996); Edwin Curley, *Hobbes and the Cause of Religious Toleration*, in *THE CAMBRIDGE COMPANION TO HOBBS'S LEVIATHAN* ch. 13, at 309 (Patricia Springborg ed., 2007).

⁵⁶ As merely one element of potential contestation, we might expect some of those unfortunately classified as grounded realists to claim ungrounded realist status, for Dworkin's purposes. And we should equally expect claims that some, if not all, of those classed by Dworkin as ungrounded realists are actually, upon deeper review, grounded realists. *See supra* notes 22-31 and accompanying text. The proper application, in individual cases, of even a maximally clarified distinction would of course inevitably pose further problems.

⁵⁷ The idea that even arguable unequals should, on one ground or another, be treated as equals for some official purpose is familiar as well within the utilitarian and related economic theory traditions. *See, e.g.*, Marco E.L. Guidi, “Everybody to Count for One, Nobody for More than One:” *The Principle of Equal Consideration of Interests from Bentham to Pigou*, 4 *Revue d'études benthamiennes* [REB] 40 (2008) (Fr.), <http://etudes-benthamiennes.revues.org/182> (last visited Nov. 8, 2013).

⁵⁸ For the distinction between the extent or scope of coverage of a right, and the depth or absoluteness of protection of the right, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *VAND. L. REV.* 265 (1981); Frederick Schauer, *Speech and “Speech” - Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 *GEO. L.J.* 899 (1979).

⁵⁹ *See* Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153-67 (Jeremy Waldron ed., 1984).

⁶⁰ A basically similar view is taken in Justice Scalia's opinion for the Court in *Employment Div. v. Smith*, 494 U.S. 872, 888-89 (1990).

⁶¹ *See, e.g.*, the compulsory schooling case of *Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972).

costly burden,⁶² cannot be long sustained if it is typically protected by a demanding strict scrutiny test.⁶³

Dworkin himself resolves this inevitable tradeoff between the scope of coverage and the strength of the free exercise right distinctly in favor of the former. Typically, the free exercise right should, Dworkin argues, be protected not by a rigorous strict scrutiny test,⁶⁴ but only by a much less demanding, if not also typically evadable, mere “ethical independence” test.⁶⁵ The ethical independence test requires merely that the exercise of religion not be restricted “just because”⁶⁶ the government deems one form of living—apart from its consequences⁶⁷—to be inherently better than another.⁶⁸ We might call this “moral independence” test, then a “weak”⁶⁹ requirement of government neutrality toward the various conceptions of good lives, as distinct from a practice’s consequences or any independent rights violation caused by the practice.⁷⁰

⁶² Consider the risks of military combat service avoided, on sincere conscientious grounds, in *Welsh v. United States*, 398 U.S. 333, 335 (1970); *United States v. Seeger*, 380 U.S. 163, 164-65 (1965).

⁶³ See *Yoder*, 406 U.S. at 215 (requiring a genuinely compelling government interest and precise narrow tailoring). Note also that the *Yoder* majority seeks, with whatever degree of success, to crucially distinguish between religious and philosophical grounds for conscience-based non-compliance with law. *Id.* at 215-16; see also the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1–2000bb-4 (1994)), *invalidated in part on other grounds by* *City of Boerne v. Flores*, 521 U.S. 507, 507 (1997); *General Conference v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010) (seeking to contrast philosophy and religion).

⁶⁴ See, e.g., *Yoder*, 406 U.S. at 215; *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). But see *Smith*, 494 U.S. at 888-89 (seeking to dispense, more or less broadly, with such a test).

⁶⁵ DWORKIN, *supra* note 1, at 130; see also *id.* at 133. The more stringently protected rights are, in Dworkin’s terminology, referred to instead as “special rights.” *Id.* at 131. Free speech is said to count as such a distinctively protected “special right.” *Id.*

⁶⁶ *Id.* at 130. It seems likely that almost any lifestyle judicially found objectionable “in itself” could also be colorably objected to on the basis of one or more supposed consequences, or rights violations, somehow sufficiently associated with that lifestyle, as Dworkin’s own illustrations suggest. *Id.*

⁶⁷ See *id.*

⁶⁸ See *id.* On Dworkin’s view, by the way, “that forests are in fact wonderful,” reflects not merely one conception of the good, but a desired consequence of certain thereby legitimate public policies. *Id.* at 131.

⁶⁹ Note especially that any officially imposed preferences among conceptions of the good life merely cannot be the sole significant motivation behind the restriction on free exercise. *Id.* Mixed governmental motives should thereby legitimize the restriction on free exercise. There may also be ways in which a government can endorse some conception of the good, non-neutrally, without substantially burdening religious exercise.

⁷⁰ For his brief prior treatment of free exercise as protected only at the lower, less demanding level of “ethical independence,” see RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 375-78 (2011). For an earlier incarnation of Dworkin’s views on government neutrality among alternative conceptions of the good life, see RONALD DWORKIN, A MATTER OF PRINCIPLE 181-204 (1985). For general critical perspective, see, for example, GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS (1997).

Let us, on this basis, conclude with a bit of further speculation. What sort of realistic priority is likely to be placed on religious free exercise by many of those newly admitted to free exercise coverage under Dworkin's theory,⁷¹ let alone by those initially and unstably denied admission by Dworkin's controversial restrictions?⁷² As the scope of coverage of any right expands, we should expect, as Dworkin's own analysis suggests,⁷³ a reduction in the general stringency with which such a right is enforced.

But this tendency is only one of the relevant considerations. Let us assume that those newly admitted—and many of those still excluded under Dworkin's criteria—are moved by considerations of conscience, in some relevant sense,⁷⁴ just as frequently and just as intensely as are currently covered theistic religious believers. By itself, though, this assumed equality of fervency would not necessarily indicate an equality in the genuine subjective priority of free exercise or individual conscience protection among all affected parties. The priority we all set, by analogy, on our right not to have troops involuntarily quartered in our homes during time of peace⁷⁵ is a function not only of the degree of genuine harm we would feel if such an event occurred, but also of the perceived likelihood of such an event's actually occurring in our own case.

The priority any of us places on free exercise will thus depend in part on our perceptions of how genuinely likely it will be that a government will more, or less, substantially burden our own, or our group's, free exercise of conscience or of religion. And this will vary according to historical and cultural or political circumstances and prospects, as well as our substantive beliefs, and the likelihood of their compatibility with government policies.⁷⁶ If there is, for one important example, no likelihood of a military draft, the realistic priority of a recognized right to conscientious objection to military or combat service⁷⁷ is likely to dramatically diminish.

Of course, a number of other substantive policy concerns may be of greater priority today, including various dimensions of equality, the environment, and health and welfare policy. But for our purposes, the key question is not the likely popularity or unpopularity or even the sheer importance of any set of these or other government policies, but whether particular classes of persons or groups are likely to feel bound in conscience not just to oppose some such policies, but to conscientiously violate some relevant binding legal requirement, in a context in which a stringently protected free exercise right would likely protect such persons from civil penalty or criminal conviction, or provide some exemption from abhorrent but legally required conduct.

⁷¹ See *supra* text accompanying notes 9-17.

⁷² See *supra* text accompanying notes 18-31.

⁷³ See *supra* notes 56-68 and accompanying text; see also Steven D. Smith, *The Phases and Functions of Freedom of Conscience* (May 2010), available at <http://ssrn.com/abstract=1615625>.

⁷⁴ See *supra* note 34.

⁷⁵ See U.S. CONST. amend. III.

⁷⁶ For one possible scenario, see Wright, *supra* note 50.

⁷⁷ See *supra* note 60 and accompanying text.

Suppose, merely as a matter of a single example, that a strong majority of those newly included—or those still excluded—under Dworkin’s approach strongly prioritize a meaningful response to global climate change. The crucial question, though, is actually of how likely it is thought to be that a predicted actual government will unequivocally require such persons, by law, to relevantly flout their conscience. It seems likely that even if persons strenuously disapprove of government policy on climate change, as a matter of moral conviction, they may well not find themselves legally bound to act, or not act, contrary to the convictions in question. This sort of example could be multiplied indefinitely.

As well, thoughtful persons will recognize that relatively strong free exercise protection for those who share their substantive moral and policy views would come at the cost, under the Equal Protection Clause,⁷⁸ of similarly stringent free exercise protection for persons whose views, on whatever subject, they find objectionable, if not abhorrent. For many of those newly enfranchised under any degree of extension of free exercise coverage, the moral cost of recognizing and protecting personally objectionable religious claims may well outweigh the genuine moral benefits of recognizing the former. A uniform absence of any constitutional recognition for conscience objection, traditionally religious or otherwise, may increasingly thus seem, on balance, increasingly attractive to many of the newly enfranchised.

⁷⁸ U.S. CONST. amend. XIV.

